

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:) Chapter 13 Case
) Number 90-60482
HOLMES WALLACE HODGES)
SS# 259-40-9940)
P. O. Box 635)
Claxton, Georgia 30714)
)
Debtor)

)
) FILED
FRANCIS W. ALLEN) at 2 O'clock & 18 min. P.M.
CHARLES H. BROWN, MARC M. BRUCE) Date: 1-11-91
AND BECKY J. DASHER, as partners)
in the law firm of ALLEN, BROWN,)
BRUCE AND DASHER)
)
Creditors/Movants)
)
vs.)
)
HOLMES WALLACE HODGES)
)
Respondent)

ORDER OF DISMISSAL WITH PREJUDICE

Francis W. Allen, Charles H. Brown, Marc M. Bruce and
Becky J. Dasher as partners in the law firm of Allen, Brown, Bruce
& Dasher, hereinafter "ABBD", a creditor, seeks dismissal of this
Chapter 13 proceeding with prejudice. Based upon the evidence
presented at hearing, this court makes the following findings of
fact and conclusions of law.

ABBD is the holder of a claim of Thirty Two Thousand Six Hundred Four and 40/100 (\$32,604.40) Dollars. The claim is secured by a first in priority deed to secure debt covering various parcels of real estate owned by the debtor. The notes evidencing the indebtedness matured prebankruptcy filing. In accordance with the terms of the debt instruments ABBD commenced nonjudicial foreclosure action in May, 1990. On June 4, 1990, one day prior to the scheduled foreclosure auction sale date of June 5, 1990, the debtor filed his first Chapter 13 proceeding, Chapter 13 case No. 90-60268 (Bankr. S.D. Ga.). The filing stayed the foreclosure sale. Although this first Chapter 13 proceeding was filed pro se, ABBD received notice of the filing via facsimile transmittal from the debtor's attorney of record in this Chapter 13 case. On June 30, 1990 the debtor voluntarily dismissed the first Chapter 13 proceeding.

ABBD once again commenced its foreclosure action advertising for an August 7, 1990 foreclosure auction sale date. On August 6, 1990 the debtor filed his second Chapter 13 proceeding, Chapter 13 case No. 90-60387 (Bankr. S.D. Ga.). The filing again stayed the foreclosure sale. By order dated August 28, 1990 this court dismissed the second Chapter 13 proceeding due to the failure of the debtor to file papers as required by order

of this court dated August 9, 1990.

ABBD again commenced foreclosure action with a October 2, 1990 foreclosure sale date. This the third Chapter 13 proceeding was filed on October 1, 1990 once again staying the foreclosure sale. The debtor failed to attend the 341 meeting of creditors and a show cause was issued requiring a response by December 6, 1990 or suffer dismissal. On December 5, 1990 the debtor filed a response to the show cause which prevented a dismissal of this case without hearing.

In response to this third Chapter 13 filing ABBD brought this motion to dismiss. ABBD contends (1) that the dismissal of the second Chapter 13 proceeding was based upon the debtor's willful failure to abide by an order of the court, the order requiring the filing of necessary papers dated August 9, 1990, thereby rendering this individual ineligible for Chapter 13 relief for a period of 180 days from August 28, 1990; (2) that this third Chapter 13 filing was filed in bad faith and represents the latest of three bankruptcy proceedings filed within 120-day period which accumulated filings constitute an unreasonable delay by the debtor that is prejudicial to creditors authorizing a dismissal, and (3) that this repeated filing is an abuse of the bankruptcy process requiring an order preventing additional bankruptcy filings by

this debtor for a period of 180 days.

As it pertains to ABBD's first grounds for dismissal, the order of dismissal of the second Chapter 13 proceeding dated August 28, 1990 did not make a determination that the failure of the debtor

to file necessary papers required by order of August 9, 1990 was a willful failure of the debtor to abide by an order of the court. Without a determination of "willful failure" the provisions of 11 U.S.C. §109(g)(1)¹ do not bar the third filing. However, this does not end the inquiry. This court must now determine whether this third Chapter 13 proceeding constitutes an abuse of the bankruptcy process requiring dismissal with prejudice.

ABBD bears the burden of proof on its motion to dismiss under 11 U.S.C. §1307(c). GMAC v. Bullock (In re: Bullock),

¹11 U.S.C. §109(g) provides:

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title [11] at any time in the preceding 180 days if

- (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
- (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title [11].

Chapter 13 case No. 89-11537 (Bankr. S.D. Ga. Aug. Div., Dalis, J. April 18, 1990). ABBD contends that the debtor filed this third Chapter 13 proceeding in bad faith and that this filing is an abuse of the bankruptcy process. Usually a determination of bad faith is best made at the time of the hearing on confirmation of a debtor's Chapter 13 plan. See 11 U.S.C. §1324; In re: Kosenka, 104 B.R. 40

(Bankr N.D. Ind. 1989); In re: Robinson, 18 B R. 891 (Bankr. D. Conn. 1982). At confirmation, the "good faith" criteria of Kitchens v. Georgia Railroad Bank & Trust Company (In re: Kitchens), 702 F.2d 885 (11th Cir. 1983) can be considered with the other confirmation criteria of 11 U.S.C. §1325. Dismissal of a petition for lack of good faith prior to consideration of a proposed plan should be ordered only under extraordinary circumstances such as where the filing represents a blatant abuse of the judicial process. In re: Robinson supra at 893.

ABBD has carried the burden of proof to establish that this third Chapter 13 filing within 120 days constitutes a blatant abuse of the bankruptcy process warranting dismissal. As of the date of the hearing on this motion to dismiss the debtor has yet to appear for a §341 meeting of creditors in any of the three bankruptcy cases. The timing of the filing of each of these cases was designed to frustrate this creditor in the exercise of

its legal rights. The debtor has failed to put forth any plausible reason for his failure to follow through on either of the two previous Chapter 13 cases. The debtor candidly admits that the first Chapter 13 proceeding filed pro se while then represented by counsel of record in the two later Chapter 13 proceeding was brought solely for the purpose of stopping the foreclosure action. The debtor's failure to file the necessary papers resulting in the dismissal of the second action, according to the debtor was caused by the failure of the Clerk of this Court to maintain a proper address of the debtor and failure of the United States Postal Service to properly deliver his mail. The failure was the debtor's failure to maintain contact with his lawyer in order to provide the necessary information for the required documentation.

Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.

The cornerstone of the bankruptcy courts has always been the doing of equity. The protection and forgiveness inherent in the bankruptcy laws surely requires conduct consistent with the concepts of basic honesty. Good faith or basic honesty is the very antithesis of attempting to circumvent a legal obligation through a technicality of the law.

In re: Waldron, 785 F.2d 936, 941 (11th Cir. 1986). See also

Flygare v. Boulden, 709 F.2d 1344, 1347 (10th Cir.

1983); U.S. v. Estus, 695 F.2d 311, 316-17 (8th Cir. 1982); In re: Rimgale, 669 F.2d 426, 431-32 (7th Cir. 1982).

In this case the debtor has brought this proceeding in bad faith and abused the bankruptcy process by attempting to circumvent and frustrate this creditor's efforts to enforce this legal obligation through a technicality of the law, the §362(a) automatic stay imposed upon the filing of a bankruptcy petition on the eve of three separate foreclosure sales. See, e.g. In re: Mark Jay Kaufman

P.A., 8 B.R. 309, (Bankr. N.D. Fla. 1987); In re: Gates, 42 B.R. 4 (Bankr. N.D. Ga. 1983).

Bankruptcy Code §105(a)² authorizes this court to issue any order that is necessary or appropriate to carry out the provisions of this title and to take such action as is necessary or appropriate to prevent an abuse of the bankruptcy process.

²11 U.S.C. §105(a) provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The debtor's action in filing the three Chapter 13 petitions each on the eve of a foreclosure auction sale by this creditor for the sole purpose of frustrating this creditor's enforcement of its legal rights constitutes such an abuse of process authorizing a dismissal with prejudice. The provisions of 11 U.S.C. §109(g) prohibits a refiling by debtor where such refiling would constitute a further abuse of the bankruptcy process. Such prohibition is appropriate in this case. The motion of ABBD to dismiss this Chapter 13 proceeding is granted.

It is therefore ORDERED that this Chapter 13 proceeding is dismissed;

further ORDERED that this debtor, Holmes Wallace Hodges is barred from filing any other petitions for relief under title 11 United States Code for a period of 180 days from the date of the entry of this order; and

further ORDERED Francis W. Allen, Charles H. Brown, Marc M. Bruce and Becky J. Dasher as partners in the law firm of Allen, Brown, Bruce & Dasher are granted relief from the automatic stay of 11 U.S.C. §362(a) in order to foreclose their security interest in property of the debtor in this or any subsequent bankruptcy proceeding brought by the debtor.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 11th day of January, 1991.